COUNT I

51. Beehive incorporates by reference into this Count I all of the previous allegations of this amended counterclaim.

52. The BOCs are each an incumbent local exchange carrier ("ILEC") within the meaning of 47 U.S.C. section 251(h).

53. DSMI is an agent of the BOCs, and therefore, DSMI's acts, omissions, or failures are deemed to be those of the BOCs under 47 U.S.C. section 217.

54. Beehive is a telecommunications carrier within the meaning of 47 U.S.C. section 153(44).

55. The SMS/800 is a network element under 47 U.S.C. section 153(29) and 47 C.F.R. section 51.3.

56. The BOCs, as ILECs, have a duty to negotiate with Beehive -- a "requesting telecommunications carrier" -- to provide it with "nondiscriminatory access" to the SMS/800 under 47 U.S.C. sections 251(c)(1) and (3).

57. The BOCs are purporting to provide access to the SMS/800 under their SMS/800 Tariff. The Court should issue an order that SMS/800 access must be provided under inter-carrier agreements pursuant to 47 U.S.C. sections 251(c)(3) and 252(a) and (b).

COUNT II

58. Beehive incorporates by reference into this Count II all of the previous allegations of this amended counterclaim.

59. The 800 numbering administration is performed by the BOCs, through DSMI, under the terms of the SMS/800 Tariff.

60. Only "impartial entities" are authorized to administer telecommunications numbering under the 1996 Telecommunications Act, 47 U.S.C. section 251(e).

61. To be impartial, the 800 number administrator, among other considerations, must not be aligned with any particular segment of the telecommunications industry.

62. Neither the BOCs nor their agent, DSMI, is impartial within the meaning of 47 U.S.C. section 251(e)(1).

63. The FCC has failed to perform the congressional mandate, expressed in 47 U.S.C. section 251(e), to remove DSMI, the BOCs' agent, as the 800 number administrator, and to replace it with an impartial entity, and the 6 month deadline which Congress gave the FCC to implement this mandate now has expired.

64. This Court should issue an order that DSMI is not an impartial entity and hence is ineligible to serve as the 800 number administrator, removing DSMI as such 800 number administrator and undoing its unlawful acts while serving as such administrator, all pursuant to 47 U.S.C. section 251(e)(1).

COUNT III

65. Beehive incorporates by reference into this Count III all of the previous allegations of this amended counterclaim.

66. Pursuant to 47 U.S.C. section 251(e)(2), the cost of 800 numbering administration must be borne by all telecommunications carriers on a competitively neutral

basis.

67. The costs of 800 numbering administration are recovered from RespOrgs and service control point owners under the SMS/800 Tariff.

68. Certain RespOrgs are not telecommunications carriers.

69. The Court should issue an order that the SMS/800 Tariff is unlawful and invalid because it fails to comply with the mandate of 47 U.S.C. section 251(e)(2), and that the costs of 800 numbering administration are not recoverable under the SMS/800 Tariff, because non-carriers are served under that tariff, refunding with interest all such illegal charges which have been billed to and paid by Beehive.

COUNT IV

70. Beehive incorporates by reference into this Count IV all of the previous allegations of this amended counterclaim.

71. The BOCs are common carriers. Therefore, as the agent of the BOCs and as the SMS/800 administrator, DSMI is obligated under the SMS/800 Tariff, now that the disputed amount at issue in the instant litigation has been paid, to serve Beehive as Beehive has requested. DSMI refuses to serve. Moreover, the BOCs and DSMI have refused to negotiate an agreement under which Beehive can obtain nondiscriminatory access to the SMS/800 at a technically feasible time.

72. DSMI has no reasonable basis in law or under the SMS/800 Tariff for refusing to serve Beehive by ceasing the disconnection action, restoring the disconnected numbers, and restoring Beehive's status as a RespOrg. It is DSMI's affirmative obligation under the

SMS/800 Tariff to service Beehive's requests. Accordingly, by its conduct as the agent of the BOCs and as the administrator of the SMS/800 Tariff, DSMI has committed the following violations of the Communications Act:

a. DSMI has refused to furnish SMS/800 service upon Beehive's reasonable request in violation of section 201(a) of the Act.

b. DSMI has engaged in unjust and unreasonable practices in the administration of the SMS/800 Tariff in violation of section 201(b) of the Act.

c. DSMI has subjected Beehive to undue or unreasonable prejudice or disadvantage in violation of section 202(a) of the Act.

d. DSMI has refused to negotiate in good faith with Beehive to provide it with nondiscriminatory access to the SMS/800 in violation of section 251(c) of the 1996 Act.

73. DSMI's deliberate and willful violations of the Communications Act have injured and will continue to injure Beehive and Beehive's customers by depriving them of the "800" numbers they use to place and receive telephone calls, and these violations have damaged and will continue to harm Beehive in various respects.

COUNT V

74. Beehive incorporates by reference into this Count V all of the previous allegations of this amended counterclaim.

75. In a pleading recently filed in this action, DSMI admits that it is not a common carrier within the meaning of the federal communications law.

76. DSMI is estopped judicially, on account of this pleading, to deny that it is not a common carrier within the meaning of the federal communications law.

77. If DSMI is not a common carrier for purposes of the federal communications law, then it may not attempt to regulate the matter of 800 number administration pursuant to a tariff, and specifically by means of the SMS/800 Tariff.

78. The Court should issue an order that, since DSMI is not a common carrier, it is illegal and unlawful for DSMI to attempt to regulate the matter of 800 number administration pursuant to the SMS/800 Tariff, and that this tariff, accordingly, is illegal, unlawful, invalid, and unenforceable, and that, likewise, the administrative actions which DSMI has taken towards Beehive heretofore are illegal, unlawful, invalid, and unenforceable.

COUNT VI

79. Beehive incorporates by reference into this Count VI all of the previous allegations of this amended counterclaim.

80. DSMI purports to administer the 800 numbers pursuant to the SMS/800 Tariff.

81. The SMS/800 Tariff provides that RespOrgs may be issued blocks of numbers on a first come/first served basis.

82. The SMS/800 Tariff provides that DSMI may not repossess numbers already allocated to a RespOrg without giving first a 30 day notice by certified mail, and then only on account of a cause which is justifiable under the Tariff as properly interpreted and implemented. Moreover, the Tariff mandates that the parties to a dispute shall attempt

to resolve that dispute through good faith negotiation.

83. DSMI's disconnection of the 629-xxxx numbers held by Beehive was not justified under the SMS/800 Tariff as properly interpreted and implemented.

84. DSMI's disconnection of the 629-xxxx numbers held by Beehive was not preceded by the 30 day notice by certified mail as required under the SMS/800 Tariff. This disconnection also was not preceded by an effort at good faith negotiation. Indeed, the surreptitious disconnection, without notice, while the parties had available forums to arbitrate the dispute, was the antithesis of an effort at good faith negotiation.

85. As a fully qualified RespOrg, in full compliance under the terms of the SMS/800 Tariff, Beehive has requested DSMI to restore the previously disconnected 629-xxxx numbers to Beehive, arguing that this may be done on a first come/first served basis since Beehive was the first to come and be served with this batch of numbers and that, in any event, Beehive was deprived of these numbers illegally in light of the requirements of notice and the like under the SMS/800 Tariff. Notwithstanding this request, DSMI refuses to comply with the terms of the SMS/800 Tariff by restoring this batch of numbers to Beehive. Moreover, DSMI refuses to comply with the terms of the SMS/800 Tariff by negotiating with Beehive in good faith for a restoration of this batch of numbers.

86. DSMI is estopped from arguing that it had any justifiable cause under the SMS/800 Tariff for disconnecting the 629-xxxx numbers in light of the interpretation which it has given to the SMS/800 Tariff through administrative practice over the years.

87. The Court should order that DSMI has violated the SMS/800 Tariff in all of the particulars alleged in this Count VI of the amended counterclaim, and should order relief to Beehive accordingly.

COUNT VII

88. Beehive incorporates by reference into this Count VII all of the previous allegations of this amended counterclaim.

89. Beehive has a constitutionally protectible property interest in the 10,000 numbers with the 629 prefix which had given to Beehive prior to the advent of the SMS/800 Tariff. Beehive continues to have a constitutionally protectible property interest in these numbers notwithstanding the advent of the SMS/800 Tariff.

90. By purporting to act under the SMS/800 Tariff in repossessing the 629-xxxx numbers from Beehive, DSMI was acting in a governmental or quasi-governmental status and/or pursuant to or under color of a governmental or quasi-governmental instrumentality, namely the SMS/800 Tariff.

91. At the time DSMI repossessed the 629-xxxx numbers of Beehive, DSMI knew that Beehive had a bona fide dispute with DSMI concerning, among other items, the validity and enforceability of the SMS/800 Tariff, the interpretations and practices of DSMI in administering and enforcing the SMS/800 Tariff, the billings which DSMI had sent to Beehive, and so forth. DSMI likewise knew that these disputes were in various stages of litigation and adjudication before the FCC, the D.C. Circuit Court of Appeals, and this Court. Instead of introducing the question of repossession after notice and a hearing in

one of these several forums, DSMI chose to proceed to repossess unilaterally, surreptitiously, and by stealth, without notice to Beehive or a hearing before any court or agency. Moreover, DSMI commenced to repossess these numbers in retaliation against Beehive because Beehive had exercised its constitutionally protected right to have access to federal courts and federal agencies in taking legal positions which were adverse to the positions of DSMI and its sponsors.

92. DSMI knew that, by the terms of the SMS/800 Tariff which it believed itself empowered to administer, a 30 day notice by certified mail was required, in any case, before repossession of the 629-xxxx numbers of Beehive could commence. DSMI also knew that, by virtue of the SMS/800 Tariff, a good faith opportunity for negotiation should have preceded the repossession of these numbers.

93. Beehive was entitled to notice and an opportunity to negotiate, prior to the commencement of repossession of the numbers, under a fair reading of the SMS/800 Tariff. Beehive was entitled to notice and a hearing before repossession by virtue of the due process clause of the Fifth Amendment to the United States Constitution.

94. By repossessing the numbers, before notice, negotiation and a hearing, DSMI violated the terms of the Tariff and the due process clause of the Fifth Amendment to the United States Constitution.

95. DSMI committed these violations knowingly, willingly, spitefully, and maliciously.

REQUEST FOR RELIEF

96. Beehive incorporates by reference into this Request for Relief all of the previous allegations of this amended counterclaim.

97. Beehive asks the Court to enter an order in favor of Beehive and against DSMI which grants relief in favor of Beehive and against DSMI in the various forms indicated heretofore in this answer and amended counterclaim, including without limitation the following.

a. For declaratory relief as requested and as may be appropriate.

b. For injunctive relief as requested and as may be appropriate.

c. For damages as requested and as may be appropriate, including without limitation, damages for loss of customers, loss of business opportunities, loss of profits, loss of investment value and good will pertaining to Beehive's 800 numbers.

d. For damages as requested and as may be appropriate, including wthout limitation, damages for the collapse of Beehive's operational network due to the disconnection of the "800" numbers upon which Beehive relies to maintain the network.

e. For damages as requested and as may be appropriate, including without limitation, damages for loss of competitive advantages as a result of being deprived of the aforesaid "800" numbers.

f. For punitive damages in an amount to be determined for DSMI's willful, deliberate, discriminatory, and vindictive violations of the federal communications laws, the SMS/800 Tariff, and the due process rights of Beehive.

g. For an order that DSMI immediately serve Beehive as Beehive reasonably has requested pursuant to the SMS/800 Tariff which is administered by DSMI.

h. For an order that DSMI immediately negotiate in good faith with Beehive as Beehive reasonably has requested under the federal communications act and the SMS/800 Tariff administered by DSMI.

i. For an order prohibiting DSMI from continuing to disconnect and repossess Beehive's "800" numbers, from refusing to re-connect and restore those numbers already disconnected and repossessed, and from reassigning any of Beehive's "800" numbers to any other person or entity.

j. For an order requiring DSMI to refund to Beehive, with interest, all monies heretofore paid under protest by Beehive to DSMI on account of the SMS/800 Tariff.

k. For an order dismissing the complaint, no cause of action.

l. For an order granting to Beehive its costs of court and attorneys' fees.

m. For an order granting to Beehive any further relief, whether or not specifically prayed for in this answer and amended counterclaim, as the Court may deem equitable, just, or appropriate under the facts and circumstances of this particular case.

Dated this 7th day of February, 1997.

Alan L. Smith
Attorney for defendant/Beehive
31 L Street, No. 107
Salt Lake City, Utah 84103
Telephone: (801) 521-3321

CERTIFICATE OF SERVICE

The undersigned certifies that on this 7th day of February, 1997, the foregoing Answer and Amended Counterclaim was served by mailing a copy of the same, first class mail, postage prepaid, addressed to Floyd A. Jensen, Ray, Quinney and Nebeker, 79 South Main Street, Suite 700, Salt Lake City, Utah 84111.

A. Smith

Exhibit D

Floyd Andrew Jensen (Bar No. 1672)
RAY, QUINNEY & NEBEKER
79 S. Main St., Suite 700
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

DATABASE SERVICE MANAGEMENT, INC., a New Jersey Corporation, Plaintiff, v. BEEHIVE TELEPHONE COMPANY, INC., a Utah Corporation, Defendant.	**MOTION TO DISMISS AMENDED COUNTERCLAIM OR, IN THE ALTERNATIVE, TO REFER CERTAIN CLAIMS TO THE FEDERAL COMMUNICATIONS COMMISSION, AND TO STAY ACTION PENDING REFERRAL** Civil No. 2:96 CV 0188J Judge Bruce S. Jenkins

Plaintiff Database Service Management, Inc. ("DSMI") hereby moves the Court to dismiss the Amended Counterclaim of defendant Beehive Telephone Company, Inc. ("Beehive"), or in the alternative, to refer certain claims in the Amended Counterclaim to the Federal Communications Commission ("FCC"), and to stay these proceedings pending such referral, on the following grounds:

Count I:

(1) Count I fails to state a claim upon which relief can be granted against DSMI under 47 U.S.C. § 251, because DSMI is neither a common carrier nor an incumbent local exchange carrier, nor deemed to be such by virtue of being the agent of the BOCs;

(2) Beehive is not entitled to a declaratory judgment with respect to alleged obligations of the Bell Operating Companies ("BOCs"), where the BOCs are not parties to this action;

(3) In the alternative, the issues raised by Count I[1] should be referred to the FCC under the doctrine of primary jurisdiction.

Count II:

(1) The Court does not have jurisdiction to render a decision on whether DSMI is an impartial entity within the meaning of 47 U.S.C. § 251(e), where Congress has expressly delegated such decision to the FCC;

(2) In the alternative, the issues raised by Count II[2] should be referred to the FCC under the doctrine of primary jurisdiction.

Count III:

(1) Beehive lacks standing to challenge the propriety of recovery of the costs of administration of the SMS/800 from non-telecommunications carriers, because it is a telecommunications carrier.

(2) In the alternative, the issues raised by Count III[3] should be

---

[1] The major issues in Count I appear to be: (1) whether the SMS/800 is a "network element" under 47 U.S.C. § 153(29); (2) whether the BOCs have a duty under 47 U.S.C. §§ 251(c)(1) and 251(c)(3) to negotiate with Beehive, and (3) whether SMS/800 access must be provided under inter-carrier agreements under 47 U.S.C. §§ 251(c)(3) and 252(a).

[2] The major issues raised by Count II appear to be: (1) whether DSMI and/or the BOCS are "impartial entities" under 47 U.S.C. § 251(e)(1); and (2) whether the FCC has improperly failed to perform its duty to appoint an impartial entity.

[3] The major issues raised by Count III appear to be: (1) whether the cost of 800 number administration must be borne by RespOrgs which are not telecommunications carriers; (2) whether the SMS/800 tariff is lawful and in compliance with 47 U.S.C. § 251(e)(2); and (3) whether Beehive has standing to challenge the SMS/800 tariff on the basis that non-telecommunications carriers bear a portion of the cost of administering the SMS/800.

referred to the FCC under the doctrine of primary jurisdiction.

Count IV:

(1) Count IV fails to state a claim upon which relief can be granted against DSMI under 47 U.S.C. §§ 201, 202, or 251, because DSMI is neither a common carrier nor an incumbent local exchange carrier, nor deemed to be such by virtue of being the agent of the BOCs;

(2) In the alternative, the issues raised by Count IV[4] should be referred to the FCC under the doctrine of primary jurisdiction.

Count V:

(1) Count V fails to state a claim upon which relief can be granted against DSMI, because DSMI does not independently regulate 800 number administration, but does so only as agent of the BOCs;

(2) In the alternative, the issue raised by Count V[5] should be referred to the FCC under the doctrine of primary jurisdiction.

Count VI:

(1) Count VI fails to state a claim against DSMI upon which relief can be granted because Beehive had no proprietary interest in nor right to have

---

[4] The major issues raised by Count IV appear to be: (1) whether DSMI is subject to liability under the 1934 Communications Act or the 1996 Telecommunications Act, where it is neither an incumbent local exchange carrier nor a common carrier; (2) whether DSMI has wrongfully failed to serve Beehive in violation of 47 U.S.C. § 201(a); (3) whether DSMI has engaged in unjust and unreasonable practices toward Beehive, in violation of 47 U.S.C. § 201(b); (4) whether DSMI has subjected Beehive to unlawful prejudice or disadvantage in violation of 47 U.S.C. § 202(a); (5) whether DSMI has refused to negotiate in good faith with Beehive in violation of 47 U.S.C. § 251(c); and (6) whether Beehive has a proprietary interest in the 629-xxxx series of "800" numbers.

[5] The major issue raised by Count V appears to be whether DSMI may lawfully administer the SMS/800 Tariff as agent of the BOCs, even though it is not itself a common carrier.

particular "800" numbers assigned exclusively to it, nor to stockpile assigned numbers for future marketing purposes;

(2) In the alternative, the issues raised by Count VI[6] should be referred to the FCC under the doctrine of primary jurisdiction.

Count VII:

(1) Count VII fails to state a claim against DSMI because it fails to sufficiently allege state action, and because Beehive does not have a constitutionally protected property interest in telephone numbers;

(2) To the extent that Count VII alleges tariff violations, it should be referred to the FCC under the doctrine of primary jurisdiction

The grounds for this motion are further explained and supported in DSMI's memorandum in support accompanying this motion.

Dated this 21st day of February, 1997.

RAY, QUINNEY & NEBEKER

By _____
Floyd A. Jensen
Attorneys for Plaintiff
Database Service Management, Inc.

[6] The major issues raised by Count VI appear to be: (1) whether Beehive had a proprietary interest in any of the 629-xxxx series of "800" numbers; (2) whether DSMI, as agent of the BOCs, has the right and authority to administer the 800 number system, including the right to determine assignments of and to disconnect 800 numbers, and (3) whether it violated the SMS/800 Tariff by disconnecting numbers previously assigned to Beehive and refusing to assign 800 numbers to Beehive.

Certificate of Service

I hereby certify that on this 21st day of February, 1997, I caused a copy of the foregoing MOTION TO DISMISS AMENDED COUNTERCLAIM OR, IN THE ALTERNATIVE, TO REFER CERTAIN CLAIMS TO THE FEDERAL COMMUNICATIONS COMMISSION, AND TO STAY ACTION PENDING REFERRAL to be hand delivered to the following:

Alan L. Smith
31 L Street, No. 107
Salt Lake City, Utah 84103

David R. Irvine
124 South 600 East, Suite 100
Salt Lake City, Utah 84102

and to be mailed by United States mail, postage prepaid, to

Janet I. Jenson
WILLIAMS & JENSEN
1155 21st St., N.W., Sluite 300
Washington, D.C. 20036

Pauline Langston

Floyd Andrew Jensen (Bar No. 1672)
RAY, QUINNEY & NEBEKER
79 S. Main St., Suite 700
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

DATABASE SERVICE MANAGEMENT, INC., a New Jersey Corporation, Plaintiff, v. BEEHIVE TELEPHONE COMPANY, INC., a Utah Corporation, Defendant.	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDED COUNTERCLAIM OR, IN THE ALTERNATIVE, TO REFER CERTAIN CLAIMS TO THE FEDERAL COMMUNICATIONS COMMISSION, AND TO STAY ACTION PENDING REFERRAL** Civil No. 2:96 CV 0188J Judge Bruce S. Jenkins

Plaintiff Database Service Management, Inc. ("DSMI") submits the following memorandum in support of its Motion to Dismiss the Amended Counterclaim of Defendant Beehive Telephone Company, Inc. ("Beehive"), or in the alternative, to refer certain claims in the Amended Counterclaim to the Federal Communications Commission ("FCC"), and to stay these proceedings pending such referral.

TABLE OF CONTENTS

STATEMENT OF FACTS

For purposes of this motion only, DSMI accepts the factual allegations, but not the legal conclusions, of the Amended Counterclaim.

ARGUMENT

INTRODUCTION

Although various Counts of the Amended Counterclaim present similar issues, DSMI will separately address its motion to dismiss with respect to each of the seven Counts of the Amended Counterclaim. To the extent that an argument pertaining to one Count applies to other Counts, DSMI will incorporate that argument by reference. However, with respect to DSMI's alternative motion to refer certain issues to the Federal Communications Commission ("FCC"), the argument will be contained in a separate section following the arguments to dismiss each of the Counts of the Amended Counterclaim.

I. COUNT I

Count I of the Amended Counterclaim seeks a declaratory ruling that the Bell Operating Companies ("BOCs") must provide SMS/800 access "under inter-carrier agreements pursuant to 47 U.S.C. §§ 251(c)(3)[1] and 252(a) and (b)."[2] Am. Countercl.

---

[1] 47 U.S.C. § 251(c) (3) imposes on incumbent LECs a

> duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

[2] 47 U.S.C. § 252(a) permits an incumbent LEC to negotiate with a party requesting interconnection, services, or network elements pursuant to Section 251. If the parties are unable to reach an agreement, Subsection (b) provides for compulsory arbitration.

¶ 57. The apparent purpose for this claim is to force DSMI to negotiate a separate agreement with Beehive for SMS/800 access, rather than requiring Beehive to comply with the terms of the SMS/800 Tariff. This is simply one more manifestation of Beehive's unwillingness to live by the same rules that apply to all other entities that seek access to the SMS/800 database. However, the claim does not request any relief directed against DSMI, nor does it even allege that DSMI acted in violation of any law or right of Beehive.

A. COUNT I FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST DSMI UNDER 47 U.S.C. § 251(c), BECAUSE DSMI IS NEITHER A COMMON CARRIER NOR AN INCUMBENT LOCAL EXCHANGE CARRIER, NOR DEEMED TO BE SUCH BY VIRTUE OF BEING THE AGENT OF THE BOCS.

To the extent that Beehive's Amended Counterclaim seeks to impose on DSMI obligations under Section 251(c) of the Telecommunications Act of 1996 ("1996 Act"), it must be dismissed, because Section 251(c) applies only to an incumbent local exchange carrier ("LEC"), and DSMI is not an incumbent LEC.

The preamble to Section 251(c) states: " Additional Obligations of **Incumbent Local Exchange Carriers**.—In addition to the duties contained in subsection (b), each **incumbent local exchange carrier** has the following duties: . . ." [emphasis added] Because the duties imposed by Section 251(c) only fall upon incumbent LECs, DSMI could violate Section 251(c) only if it were an incumbent LEC. Beehive has not alleged that DSMI is a LEC, much less an incumbent LEC.

1. DSMI is not an incumbent LEC under the statutory definitions.

"Incumbent local exchange carrier" is defined as follows:

> Definition.—For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange

carrier that—

> (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and
>
> (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to Section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or
>
> (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

47 U.S.C. § 251(h)(1) (1996).[3]

DSMI does not fit any part of the statutory definition of incumbent local exchange carrier. It does not provide service within a telephone exchange, nor does it offer access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services. DSMI is not a member of any exchange carrier association. Therefore, Section 251(c) cannot apply to DSMI, and any asserted cause of action against DSMI based on that statute must fail as a matter of law.[4] Indeed, Beehive does not allege that DSMI fits the statutory definition of an

---

[3] "Local exchange carrier" means

> any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

47 U.S.C. § 153(44) (1996). "Telephone exchange service" is defined as

> service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

47 U.S.C. § 153(r) (1934). "Exchange access" is defined as

> the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

47 U.S.C. § 153(40) (1996).

[4] In the event that a bona fide issue exists as to whether DSMI is an incumbent local exchange carrier, a classic case of disputed interpretation of the 1996 Act would be presented, which should be referred to the FCC under the doctrine of primary jurisdiction. *See infra* Point VII.

incumbent LEC, but rather seeks to imply that DSMI has the statutory duties and liability of an incumbent LEC by virtue of being owned by the BOCs (which are incumbent LECs), or by virtue of being the BOCs' agent. [See Am. Countercl. ¶¶ 21, 53] Such a conclusion is neither logical nor justified under decisions of the courts and the FCC.

2. DSMI is neither a common carrier nor an incumbent LEC by virtue of being owned by Bellcore or the BOCs.[5]

The attributes of a parent are not necessarily the attributes of the subsidiary. For example, Beehive could own a subsidiary, the only business of which is to operate a gambling casino; that does not mean that the casino subsidiary is a common carrier simply because Beehive is a common carrier. Status as a common carrier, or as an incumbent LEC, is conferred not by ownership, but by the functions performed by the entity in question, as set forth in the statutory definitions. *See* 47 U.S.C. §§ 153(h), 251(h). Therefore, the facts that DSMI is owned by Bellcore, and that Bellcore is presently owned by or comprised of the BOCs, does not necessarily mean that DSMI has the BOCs' regulatory attributes, nor their duties or potential liability under the 1934 and 1996 Acts.

3. DSMI is neither a common carrier nor an incumbent LEC by virtue of being the agent of Bellcore or the BOCs.

As with ownership, agency does not imbue the agent with the attributes of the

---

[5] With respect to DSMI's ownership by the BOCs, it should be noted that the BOCs have agreed to sell Bellcore, the parent of DSMI, to Science Applications International Corporation. The sale is scheduled to close in late 1997, contingent on obtaining required regulatory approvals. *See* press release of November 21, 1996, attached hereto as Exhibit "A." If and when the sale closes, Beehive's argument that the 1934 Act or the 1996 Act apply to DSMI by virtue of the BOCs' ownership of DSMI will become moot. Similarly, Beehive's argument that DSMI is not an "impartial entity" for purposes of 47 U.S.C. § 251(e) because it is owned by the BOCs will likewise become moot.

principal. Beehive errs in assuming that merely because the BOCs are common carriers and/or incumbent LECs, and that DSMI is their agent, DSMI itself must be deemed to be a common carrier or an incumbent LEC. In support of that assumption, Beehive cites Section 217 of the 1934 Act [Am. Countercl. ¶ 53], which in essence makes a common carrier responsible for the acts of its agents within the scope of their employment—a codification of a common principle of the law of agency. However, imposing liability on a principal for the authorized acts of its agent is plainly not the same as endowing the agent with all of the attributes of the principal. Thus Beehive's allegation of agency, even if true, does not impose liability on DSMI under a statute that by its terms only applies to incumbent LECs. While Beehive may assert a claim against a **BOC** for violation of the 1934 and 1996 Acts (because BOCs are common carriers and incumbent LECs), it may not do so against DSMI, which is neither a common carrier nor an incumbent LEC.

The D.C. District Court and Circuit Court of Appeals have held that entities are not common carriers under the 1934 Act, simply because they perform functions under the Act as agents of common carriers. In Allnet Communication Service, Inc. v. National Exchange Carrier Association, Inc., 741 F. Supp. 983 (D.D.C. 1990), *aff'd,* 965 F.2d 1118 (D.C. Cir. 1992), the court held that NECA, an association of BOCs and other LECs, was not a common carrier, even though it performed the function of filing access charge tariffs on behalf of its members, and even though many of its officers and employees were on temporary assignment from the LECs. The court stated:

> ALLNET has stated that NECA acts as an agent for its common carrier members. . . . However, this does not transform NECA into a carrier for